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4 UNITED STATES DISTRICT COURT  
5 SOUTHERN DISTRICT OF CALIFORNIA  
6

7 Scott W. Smith,

8 Petitioner,

9 v.

10 Shawn Hatton, Warden,

11 Respondent.

Case No.: 16-cv-02399-LAB-JLB

**REPORT AND  
RECOMMENDATION GRANTING  
RESPONDENT'S MOTION TO  
DISMISS**

[ECF No. 9]

12  
13 This Report and Recommendation is submitted to United States District Judge Larry  
14 Alan Burns pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the United  
15 States District Court for the Southern District of California.

16 **I. INTRODUCTION**

17 Petitioner Scott W. Smith ("Petitioner"), a state prisoner proceeding *pro se*, filed a  
18 Petition for Writ of Habeas Corpus (the "Petition") pursuant to 28 U.S.C. § 2254. (ECF  
19 No. 5, hereinafter "Pet.")<sup>1</sup> Before the Court is Respondent's Motion to Dismiss on the  
20 grounds that Petitioner's first claim for habeas relief is not a federal constitutional claim;  
21 the Petition is an unauthorized second petition; and the Petition is barred as untimely by  
22 the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") statute of limitation  
23 under 28 U.S.C. § 2244(d). (ECF No. 9-1.) Petitioner did not file an opposition to the  
24 motion to dismiss.<sup>2</sup>

25  
26 <sup>1</sup> The Petition is docketed as the "First Amended Petition for Writ of Habeas Corpus." (See ECF No. 5.)  
27 The first petition filed in this case was dismissed without prejudice because Petitioner failed to sign the  
28 petition under penalty of perjury. (ECF Nos. 4, 5.)

<sup>2</sup> Pursuant to this Court's October 25, 2016 Order, the deadline for Petitioner to file his opposition, if any,  
to the motion to dismiss was January 30, 2017. (ECF No. 6 at ¶4.)

1 The Court, having reviewed the operative Petition, Respondent's Motion to Dismiss,  
2 and the state court records filed, concludes that the Petition is barred as a successive petition  
3 and as it is untimely under AEDPA's one-year statute of limitation. Accordingly, the Court  
4 **RECOMMENDS** that Respondent's Motion to Dismiss (ECF No. 9) be **GRANTED**.

## 5 **II. PROCEDURAL HISTORY**

6 On September 5, 2002, Petitioner entered a guilty plea to willfully and unlawfully  
7 committing a lewd and lascivious act upon a child under the age of 14 years in violation of  
8 Cal. Penal Code § 288(a). (ECF No. 10-2 at 3-7; *see also* ECF 10-5 at 9 (Count 1), 104,  
9 112.) He further admitted having two strike priors for separate incidents, one for violation  
10 of Cal. Penal Code § 288(a) and one for violation of Cal. Penal Code § 288(b). (ECF No.  
11 10-2 at 8-9.) On December 30, 2002, and in accordance with the plea, the Superior Court  
12 of California sentenced Petitioner to prison for a stipulated term of 25 years to life. (ECF  
13 Nos. 10-4 at 2, 6.) *See also People v. Smith*, No. D041776, 2004 WL 348882, at \*1 (Cal.  
14 Ct. App. Feb. 25, 2004).

15 On March 7, 2003, Petitioner initiated a direct appeal by filing a notice of appeal.  
16 (ECF No. 10-5 at 94-102; ECF No. 10-6 at 6.) On direct appeal to the California Court of  
17 Appeal, Petitioner's appellate counsel filed a brief that requested a review of the record for  
18 error, but raised no specific issues as permitted under *People v. Wende*, 25 Cal. 3d 436  
19 (1979).<sup>3</sup> (ECF Nos. 10-6, 10-7.) In addition, with leave of court, Petitioner filed a  
20 supplemental brief before the Court of Appeal. (ECF Nos. 10-7, 10-8.)

21 The Court of Appeal provided the following summary of Petitioner's claims on  
22 direct appeal:

23 He states that he is unable to file a supplemental brief because he does  
24 not have the trial court transcripts. He contends the rule precluding  
25 raising an issue in a collateral proceeding if it has been raised on appeal  
26 deprives him of due process of law. However, he informally states that

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27 <sup>3</sup> *See People v. Wende*, 25 Cal. 3d at 441 ("We conclude that *Anders* [*v. California*, 386 U.S. 738 (1976)]  
28 requires the court to conduct a review of the entire record whenever appointed counsel submits a brief  
which raises no specific issues or describes the appeal as frivolous.").

1 his appellate counsel was ineffective in filing the *Wende* brief when  
2 issues exist regarding effective assistance of trial counsel; the trial court  
3 failing to hold a *Marsden* hearing (*People v. Marsden* (1970) 2 Cal.3d  
4 118) or an evidentiary hearing on his motion to withdraw the guilty  
5 plea; the entry of the guilty plea not meeting the requirements of *In re*  
*Tahl* (1969) 1 Cal.3d 122 and *Boykin v. Alabama* (1969) 395 U.S. 238;  
and the court not inquiring into a factual basis for the guilty plea.

6 (ECF No. 10-9 at 2.) The Court of Appeal reviewed the entire record and affirmed the  
7 judgment of the Superior Court on February 25, 2004. (ECF No. 10-9.) Petitioner did not  
8 seek review in the California Supreme Court. (ECF No. 10-10 at 5-6; ECF No. 10-16 at  
9 3.)

10 Next, Petitioner timely initiated and completed a full round of state habeas corpus  
11 petitions. (See ECF No. 10-16.) The Superior Court denied the first habeas petition in a  
12 written opinion on May 26, 2004. (ECF No 10-17 at 4.) On September 21, 2004, the Court  
13 of Appeal denied the second petition in a written decision. (*Id.*) Then, on September 21,  
14 2005, the California Supreme Court denied the final petition without citation of authority.  
15 (*Id.*) By the end of 2005, Petitioner had exhausted the following habeas issues in state  
16 court: (1) whether his Sixth Amendment right to competent counsel was violated when his  
17 appellate counsel allegedly rendered ineffective assistance; (2) whether his Sixth  
18 Amendment right to competent counsel was violated when his trial counsel allegedly  
19 rendered ineffective assistance; (3) whether the state trial court violated his Fourteenth  
20 Amendment right to due process and his Sixth Amendment right to a fair trial by allegedly  
21 failing to ensure his guilty plea was entered knowingly, voluntarily and intelligently, failing  
22 to ensure there was a factual basis for his guilty plea, admitting the facts of his prior  
23 conviction under Penal Code section 1108, and failing to properly handle his motion to  
24 withdraw his guilty plea. (*Id.* at 5.)

25 On December 21, 2005, Petitioner filed a federal habeas corpus petition, raising the  
26 same claims that he had previously exhausted in the state courts. (*Id.* at 4-5.) The district

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1 court analyzed the 2005 petition on the merits, denied each claim for habeas relief with  
2 prejudice, and entered judgment on July 10, 2007. (ECF No. 10-17.)

3 More than seven years later, after the California Supreme Court decision in *People*  
4 *v. Vargas*, 59 Cal.4th 635 (2014), Petitioner filed a petition for writ of habeas corpus in the  
5 California Superior Court, case number HSN-1412. (See ECF No. 10-19.) At that time,  
6 Petitioner claimed that he was given two strike priors for one crime and one victim, which  
7 he argued was unconstitutional and should be stricken under *Vargas*. (*Id.* at 1.) On October  
8 22, 2015, the Superior Court denied the Petition on the merits. (*Id.* at 1-2.) The court  
9 concluded that “Petitioner’s claim that his two strikes were based on the same act is  
10 incorrect and the reasoning of *Vargas* does not apply.” (*Id.* at 2.)

11 On November 10, 2015, Petitioner filed a petition for writ of habeas corpus in the  
12 California Court of Appeal, case number D069202, wherein he raised the same claim that  
13 had been presented in the Superior Court. (ECF No. 10-20.) Petitioner also raised claims  
14 that his trial counsel provided constitutionally ineffective assistance by failing to argue  
15 Petitioner’s two prior convictions could not be counted as two separate strikes; the  
16 prosecution denied him due process by requesting and obtaining imposition of a third-strike  
17 sentence based on those convictions without an evidentiary hearing; and the Superior Court  
18 denied him due process by misapplying *Vargas* and denying the habeas corpus petition he  
19 filed in that court without holding an evidentiary hearing. (*Id.*; ECF No. 10-21 at 1-2.)

20 On November 13, 2015, the California Court of Appeal denied the petition. (ECF  
21 No. 10-21.) It determined that the entire petition was barred as untimely “without any  
22 explanation for the long delay.” (*Id.* at 2.) Further, with respect to Petitioner’s claim of  
23 ineffective assistance of counsel, the Court of Appeal held that it was also barred as a  
24 successive petition “because it is merely a variation on claims considered and rejected on  
25 direct appeal and in his prior habeas corpus petitions.” (*Id.*) Finally, the Court of Appeal  
26 denied Petitioner’s petition on the merits, reasoning:

27 Even if Smith’s petition were not procedurally barred, it would  
28 fail on the merits. His claim the prosecution did not adequately prove

1 his prior convictions for purposes of sentencing under the Three Strikes  
2 law is an attack on the sufficiency of the evidence, which is “not  
3 cognizable in a habeas corpus proceeding.” (*In re Reno*, *supra*, 55  
4 Cal.4th at p. 505.) His claim based on *Vargas*, *supra* 59 Cal.4th 635,  
5 has no merit. In *Vargas*, the California Supreme Court considered  
6 “whether two prior convictions arising out of a single act against a  
7 single victim can constitute two strikes under the Three Strikes law”  
8 and “conclude[d] they cannot.” (*Id.* at p. 637.) Smith has not included  
9 with his petition the plea agreement, the transcript of the plea hearing,  
10 or any other document concerning his prior convictions that would  
11 allow this court to determine whether or not those convictions arose out  
12 of a single act against a single victim. His conclusory assertion “there  
13 was one victim, one act” is insufficient to sustain his pleading burden.  
14 (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) The assertion is also  
15 contradicted by the superior court’s order denying habeas corpus relief,  
16 which Smith attached to his petition and which states the plea  
17 agreement showed the two prior convictions were “for separate  
18 incidents.” Without presenting evidence the prior convictions did in  
19 fact arise out of a single act against a single victim, Smith cannot fault  
20 his trial counsel for not arguing the convictions could not be counted as  
21 separate strikes under the Three Strikes law. (See, e.g., *In re Reno*,  
22 *supra*, at pp. 499-500 [“unadorned and unexplained assertions of  
23 ineffective assistance of counsel . . . are inadequate to satisfy  
24 [petitioner’s] pleading burden”]; *People v. Stratton* (1988) 205  
25 Cal.App.3d 87, 93 [defendant must prove by preponderance of  
26 evidence that counsel’s representation was deficient].)

27 Finally, this court does not consider Smith’s objections to the  
28 superior court’s order denying the petition for writ of habeas corpus he  
filed in that court. Such an order is not appealable or otherwise  
reviewable by this court. (*In re Clark*, *supra*, 5 Cal.4th at p. 767, fn. 7;  
*In re Crow* (1971) 4 Cal.3d 613,621, fn. 8.).

(*Id.*)

On March 14, 2016, Petitioner filed a petition in the California Supreme Court.  
(ECF No. 10-22.) On May 11, 2016, the California Supreme Court denied the petition with  
citation to *People v. Duvall*, 9 Cal.4th 464, 474 (1995) and *In re Swain*, 34 Cal.2d 300, 304  
(1949), but otherwise without comment. (ECF No. 10-23.)

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1           Petitioner again filed a federal habeas petition in this district court on September 21,  
2 2016, which was amended on October 20, 2016. (ECF Nos. 1, 5.) The amended petition  
3 is the Petition presently before the Court. (ECF No. 5.) The Petition presents three grounds  
4 for relief: (1) whether “Petitioner received unauthorized sentence that requires reversal and  
5 remand for due process;” (2) whether “Petitioner received ineffective assistance of counsel  
6 during the Superior Court appearances and on appeal;” and (3) whether the state court erred  
7 in denying Petitioner an evidentiary hearing to which he was entitled. (*Id.* at 6-8.)

### 8 **III. ANALYSIS**

#### 9 **A. Second or Successive Petition**

10           Respondent argues the Petition must be dismissed under AEDPA, 28 U.S.C.  
11 § 2244(b), because Petitioner filed a prior federal petition seeking habeas relief arising  
12 from his 2002 conviction. (ECF No. 9-1 at 13.) The Court agrees.

13           As set forth herein, the instant Petition is not the first petition for a writ of habeas  
14 corpus Petitioner has filed with this district court challenging his 2002 conviction and  
15 sentence for committing a lewd act upon a child under the age of 14 following a guilty plea  
16 in San Diego County Superior Court. On October 26, 2005, Petitioner filed his first federal  
17 petition arising from his 2002 lewd act conviction in this district court in case number  
18 05cv2021. (ECF No. 10-17 at 1.) On July 10, 2007, the district court denied the petition  
19 on the merits. (ECF No. 10-17 at 1-32.) Petitioner appealed that determination. On  
20 November 22, 2010, the Ninth Circuit Court of Appeals denied Petitioner’s request for a  
21 certificate of appealability. (*See* Order filed Nov. 22, 2010 in case No. 05cv2021-H-POR,  
22 [ECF No. 37].)

23           The instant Petition, filed in 2016, must be dismissed as a successive petition.  
24 Petitioner is again challenging the sentence and conviction he challenged in his prior  
25 federal habeas petition. Unless a petitioner shows he has obtained an order from the  
26 appropriate court of appeals authorizing the district court to consider a successive petition,  
27 the petition may not be filed in the district court. *See* 28 U.S.C. § 2244(b)(3)(A); *see also*  
28 *Burton v. Stewart*, 549 U.S. 147, 153 (2007) (a petition is successive where it challenges

1 “the same custody imposed by the same judgment of a state court” as a prior petition). A  
2 successive application is permissible “only if it rests on a new rule of constitutional law,  
3 facts that were previously unavailable, or facts that would be sufficient to show  
4 constitutional error in the petitioner’s conviction.” 28 U.S.C. § 2244(b)(2). “Even if a  
5 petitioner can demonstrate that he qualifies for one of these exceptions, he must seek  
6 authorization from the court of appeals before filing his new petition with the district  
7 court.” *Woods v. Carey*, 525 F.3d 886, 888 (9th Cir. 2008) (citing 28 U.S.C. § 2244(b)(3)).  
8 Here, the Ninth Circuit Court of Appeals has not granted Petitioner leave to file a  
9 successive petition. Therefore, this Court cannot consider the Petition.

#### 10 **B. Statute of Limitation under AEDPA**

11 Even if the Petition were not successive, it would still be dismissed as untimely.  
12 Federal habeas corpus petitions are governed by AEDPA’s one-year statute of limitation.  
13 28 U.S.C. § 2244(d)(1). AEDPA, enacted on April 24, 1996, applies to convictions  
14 finalized thereafter. Pursuant to 28 U.S.C. § 2244(d)(1), the one-year limitation begins at  
15 the latest of:

- 16 (A) the date on which the judgment became final by the conclusion of  
17 direct review or the expiration of the time for seeking such review;
- 18 (B) the date on which the impediment to filing an application created  
19 by State action in violation of the Constitution or laws of the United  
20 States is removed, if the applicant was prevented from filing by such  
21 State action;
- 22 (C) the date on which the constitutional right asserted was initially  
23 recognized by the Supreme Court, if the right has been newly  
24 recognized by the Supreme Court and made retroactively applicable to  
25 cases on collateral review; or
- 26 (D) the date on which the factual predicate of the claim or claims  
27 presented could have been discovered through the exercise of due  
28 diligence.

28 28 U.S.C. § 2244(d)(1)(A)-(D). In most cases, the one-year period runs pursuant to  
subsection (A), the date on which the judgment becomes final by the conclusion of direct  
review or the expiration of time for seeking such review. 28 U.S.C. § 2244(d)(1)(A).

1 Here, Petitioner did not appeal to the California Supreme Court after the Court of  
2 Appeal filed its decision affirming the judgment on February 25, 2004. The California  
3 Court of Appeal's decision became "final" for purposes of filing a petition for review on  
4 March 26, 2004, 30 days after the California Court of Appeal's February 25, 2004,  
5 decision. *See* Cal. R. Ct. 8.264(b). The time to file a petition for review in the California  
6 Supreme Court expired 10 days later, on April 5, 2004. Cal. R. Ct. 8.500(e)(1). Thus,  
7 AEDPA's statute of limitations started to run on April 5, 2004 and expired one year later,  
8 on April 5, 2005.<sup>4</sup> *Gaston v. Palmer*, 417 F.3d 1030, 1033 (9th Cir. 2005) ("Gaston's  
9 conviction became final . . . forty days after the dismissal by the [California] Court of  
10 Appeal") (citing Cal. R. Ct. 24(b)(1) (renumbered Rule 8.264, effective January 1, 2007)).  
11 Thus, pursuant to subsection (A) of § 2244(d)(1), the Petition, which was first filed in 2016,  
12 is untimely unless Petitioner can show that he is entitled to statutory tolling, a delayed start  
13 date, or equitable tolling.<sup>5</sup>

#### 14 **1. Statutory Tolling**

15 As a threshold matter, once a petitioner is notified that his petition is subject to  
16 dismissal based on AEDPA's one-year limitation period, he bears the burden of  
17 demonstrating that limitation period is sufficiently tolled under statutory and/or equitable  
18 principles. *Smith v. Duncan*, 297 F.3d 809, 812-13 (9th Cir. 2002) *overruled on other*  
19 *grounds by Pace v. Diglielmo*, 544 U.S. 408, 418 (2005); *Johnson v. Lewis*, 310 F. Supp.  
20 2d 1121, 1125 (C.D. Cal. 2004) (holding the petitioner has the burden of demonstrating  
21 tolling facts). Petitioner fails to make such a showing.

22 Section 2244(d)(2) provides for statutory tolling for the time during which a  
23 "properly filed application for State post-conviction or other collateral review with respect  
24 to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). Generally, "the  
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26 <sup>4</sup> Respondent contends finality occurred on April 6, 2004, presumably not accounting for the fact that  
27 2004 was a leap-year. (*See* ECF No. 9-1 at 16.)

28 <sup>5</sup> Respondent points out that it may be argued that the Petition was filed in June, August, or September  
when Petitioner handed the federal petitioner to prison officials. (ECF No. 9-1 at 16.) Because the exact  
date of filing is inconsequential to this Court's analysis, the Court need not decide the exact date of filing.



1 statute of limitations is tolled from the time the first state habeas petition is filed until the  
2 California Supreme Court rejects the petitioner's final collateral challenge[.]" *Nino v.*  
3 *Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999), (footnotes omitted), cert. denied, 529 U.S.  
4 1104 (2000), so long as the petitioner did not unreasonably delay in seeking collateral  
5 relief. *Carey v. Saffold*, 536 U.S. 214, 223 (2002). This includes so-called "gap tolling"  
6 for the periods of time between such state habeas petitions, provided that the petitioner  
7 proceeds in a hierarchical order from one lower state court to a higher state court. *Id.*  
8 However, "AEDPA's statute of limitations is not tolled from the time a final decision is  
9 issued on direct state appeal and the time the first state collateral challenge is filed because  
10 there is no case 'pending' during that interval." *Nino*, 183 F.3d at 1006.

11 Here, AEDPA's statute of limitations would have begun to run on April 5, 2004.  
12 However, the limitations period did not begin to run on that date because, on March 25,  
13 2004, Petitioner timely initiated procedurally proper state collateral review proceedings of  
14 the pertinent judgment. (ECF No. 10-10 at 7; ECF No 10-17.) State collateral review  
15 concluded with the California Supreme Court's denial of habeas relief on September 21,  
16 2005. (See ECF No. 10-15.) Thus, pursuant to AEDPA, Petitioner had until September  
17 21, 2006 to file a federal petition.

18 On October 26, 2005, Petitioner timely filed a petition in this district court in case  
19 number 05cv2021. (ECF No. 10-17 at 1.) However, that is not the petition presently before  
20 this court. Further, AEDPA's statute of limitations was not tolled while Petitioner's prior  
21 federal habeas petition filed in 2005 was pending. *Duncan v. Walker*, 533 U.S. 167, 181-  
22 82 (2001) ("we are convinced that § 2244(d)(2) does not toll the limitation period during  
23 the pendency of a federal habeas petition").

24 Petitioner initiated a second round of state collateral review of the pertinent  
25 judgment at some point in 2014 or 2015, when he filed a petition for writ of habeas corpus  
26 in the California Superior Court. (ECF No. 10-19.) However, under section 2242(d)(2),  
27 Petitioner cannot rely on this round of state collateral review to revive his one-year  
28 limitation period. See *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (holding

1 that AEDPA does not “permit the reinitiation of the limitations period that has ended before  
2 the state petition was filed,” even if the state petition was timely filed); *see also Moore v.*  
3 *Crosby*, 321 F.3d 1377, 1381 (11th Cir. 2003) (maintaining a state application for post-  
4 conviction relief does not revive the one-year limitations period if such period has expired).  
5 Therefore, Petitioner’s round of state collateral review that he initiated in 2014 or 2015  
6 does not revive or restart AEDPA’s one-year limitation period that expired several *years*  
7 earlier.

8 Therefore, the Petition is barred as untimely under AEDPA, unless a delayed start  
9 date or equitable tolling is applicable.

## 10 **2. Delayed Start Date**

11 As set forth above, AEDPA’s one-year statute of limitation period begins at the latest  
12 of four possible dates, each outlined in subsections (A) through (D) of 28 U.S.C.  
13 § 2244 (d)(1). As discussed above, subsection (A) provides for a start date of April 5,  
14 2004, but that start date was statutorily tolled until September 21, 2005. Subsections (B)  
15 and (D) do not apply to this case.<sup>6</sup> Accordingly, the Court turns to whether the application  
16 of subsection (C) results in a delayed start date for Petitioner’s limitation period.

17 At best, Petitioner seems to contend that § 2244(d)(1)(C) applies to trigger a later  
18 start to the limitations period. (Pet. at 10-12.) Under § 2244(d)(1)(C), the one-year statute  
19 of limitations begins to run on “the date on which the constitutional right asserted was  
20 initially recognized by the Supreme Court, if the right has been newly recognized by the  
21 Supreme Court and made retroactively applicable to cases on collateral review.” 28 U.S.C.  
22 § 2244(d)(1)(C). Petitioner seems to believe that the case upon which he relies in seeking  
23 federal habeas relief – the California Supreme Court’s July 10, 2014 decision in *People v.*  
24 *///*

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25  
26 <sup>6</sup> Subsections (B) and (D) are not applicable to the current matter. As to subsection (B), Petitioner has not  
27 alleged a state-action impediment prevented him from filing. As to subsection (D), Petitioner argues that  
28 there is a new rule of law that should apply, but has not alleged that the *factual* predicate of the claim or  
claims presented could not have been discovered earlier through the exercise of due diligence. (*See*  
*generally* Pet.)

1 *Vargas*, 59 Cal.4th 635 (2014) – was decided by the United States Supreme Court and,  
2 thus, revives his untimely claims. Such an argument is without merit.

3 As an initial matter, the California Supreme Court’s decision in *Vargas* involved a  
4 matter of state statutory construction and does not purport to set forth a newly recognized  
5 constitutional right. *See generally Vargas*, 59 Cal.4th at 640-49. “[I]t is only  
6 noncompliance with *federal* law that renders a State’s criminal judgment susceptible to  
7 collateral attack in the federal courts. *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010). The text  
8 of the habeas statute unambiguously provides that a federal court may issue a writ of habeas  
9 corpus to a state prisoner “only on the ground that he is in custody in violation of the  
10 Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). Thus, a writ  
11 of habeas corpus “is unavailable for alleged error in the interpretation or application of  
12 state law.” *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985); *Hubbart v. Knapp*,  
13 379 F.3d 773, 779 (9th Cir. 2004).

14 Moreover, § 2244(d)(1)(C) applies only when the United States Supreme Court itself  
15 makes a new rule retroactive to cases on collateral review. *See Dodd v. United States*, 545  
16 U.S. 353, 357 (2005) (construing identical language in § 2255 as expressing “clear”  
17 congressional intent that delayed accrual is inapplicable unless the United States Supreme  
18 Court itself has made the new rule retroactive). As Petitioner’s claims are not based on a  
19 constitutional right that the United States Supreme Court has newly recognized and made  
20 retroactively applicable to cases on collateral review, § 2244(d)(1)(C) does not apply.

21 Consequently, subsection (C), does not save Petitioner’s untimely petition.  
22 Accordingly, Respondent’s Motion to Dismiss (ECF No. 9) should be granted as the  
23 Petition is barred by AEDPA’s one-year statute of limitation, unless Petitioner can show  
24 equitable tolling is applicable.

### 25 **3. Equitable Tolling**

26 Petitions filed under Section 2244(d) may be subject to equitable tolling in  
27 appropriate cases. *Holland v. Florida*, 560 U.S. 631, 645 (2010). Generally, a litigant  
28 seeking equitable tolling bears the burden of establishing two elements: (1) that he has been

1 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his  
2 way. *Pace*, 544 U.S. at 418. The Ninth Circuit has found equitable tolling appropriate  
3 only in rare circumstances that truly rise to the level of extraordinary.

4 Here, the Court need not address Petitioner's diligence because there is no  
5 "extraordinary circumstance" before the Court to warrant the applicability of equitable  
6 tolling to the Petition. The Petition is merely a variation on claims considered and rejected  
7 on direct appeal and in his prior habeas corpus petitions. Further, the California Supreme  
8 Court's recent decision in *Vargas* does not address a federal question, nor does it establish  
9 a new federal constitutional rule. On this record, there are no extraordinary circumstances  
10 before the Court.

11 Turning to the California Supreme Court's recent decision in *Vargas*, the court held  
12 that two prior convictions arising out of a single act against a single victim cannot constitute  
13 two strikes under California's Three Strikes Law. *Vargas*, 59 Cal.4th at 637. Petitioner's  
14 claim that his sentence is contrary to the decision in *Vargas* presents a purely state  
15 sentencing law claim not cognizable in a federal habeas proceeding. *See Swarthout v.*  
16 *Cooke*, 562 U.S. 216, 219 (2011) ("We have stated many times that 'federal habeas corpus  
17 relief does not lie for errors of state law.'"); *Russell v. Fox*, No. 15cv2709, 2016 WL  
18 1599481, at \*13 (N.D. Cal. Apr. 20, 2016) ("Petitioner's claim that his life sentence under  
19 the Three Strikes Law does not conform with *Vargas* presents a purely state sentencing  
20 law claim not cognizable in federal habeas"). Thus, the California Supreme Court's recent  
21 decision in *Vargas* does not constitute extraordinary circumstances supporting equitable  
22 tolling.

23 Moreover, Petitioner's state law claim under *Vargas* appears to be without merit  
24 because, as the state courts on collateral review reasonably concluded:

25 His claim based on *Vargas*, *supra* 59 Cal.4th 635, has no merit.  
26 In *Vargas*, the California Supreme Court considered "whether two prior  
27 convictions arising out of a single act against a single victim can  
28 constitute two strikes under the Three Strikes law" and "conclude[d]  
they cannot." (*Id.* at p. 637.) Smith has not included with his petition

1 the plea agreement, the transcript of the plea hearing, or any other  
2 document concerning his prior convictions that would allow this court  
3 to determine whether or not those convictions arose out of a single act  
4 against a single victim. His conclusory assertion “there was one victim,  
5 one act” is insufficient to sustain his pleading burden. (*People v. Duvall*  
6 (1995) 9 Cal.4th 464, 474.) The assertion is also contradicted by the  
7 superior court’s order denying habeas corpus relief, which Smith  
8 attached to his petition and which states the plea agreement showed the  
9 two prior convictions were “for separate incidents.” Without presenting  
10 evidence the prior convictions did in fact arise out of a single act against  
11 a single victim, Smith cannot fault his trial counsel for not arguing the  
12 convictions could not be counted as separate strikes under the Three  
13 Strikes law. (See, e.g., *In re Reno, supra*, at pp. 499-500 [“unadorned  
14 and unexplained assertions of ineffective assistance of counsel . . . are  
15 inadequate to satisfy [petitioner’s] pleading burden”]; *People v.*  
16 *Stratton* (1988) 205 Cal.App.3d 87, 93 [defendant must prove by  
17 preponderance of evidence that counsel’s representation was  
18 deficient].).

19 (ECF No. 10-21.) Therefore, equitable tolling does not apply based on the record before  
20 the Court, and Respondent’s Motion to Dismiss (ECF No. 9) should be granted.

#### 21 **IV. CONCLUSION**

22 For the reasons outlined above, **IT IS HEREBY RECOMMENDED** that the Court  
23 issue an order: (1) approving and adopting this Report and Recommendation, and  
24 (2) granting Respondent’s Motion to Dismiss the Petition (ECF No. 9) with prejudice.

25 **IT IS ORDERED THAT** any party to this action may file written objections with  
26 the District Court and serve a copy on all parties no later than **May 2, 2017**. The document  
27 should be captioned “Objections to Report and Recommendation.”

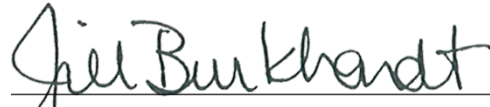
28 **IT IS FURTHER ORDERED THAT** any reply to the objections shall be filed with  
the District Court and served on all parties no later than **May 16, 2017**. The parties are  
advised that failure to file objections within the specified time may waive the right to raise

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///

1 those objections on appeal of the District Court's order. *See Turner v. Duncan*, 158 F.3d  
2 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991).

3 **IT IS SO ORDERED.**

4 Dated: April 10, 2017

5   
6 Hon. Jill L. Burkhardt  
7 United States Magistrate Judge  
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